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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re;

RENEE ROSS,

Debtor(s).

CHAPTER 7

CASE NO.: 4:09-bk-22309-EWH

U.S. BANK NATIONAL ASSOCIATION, as
Successor Trustee to Bank of America,
National Association, as successor by merger
to LaSalle Bank, N.A., as Trustee for the
MLMI Trust Series 2006-AHL1,

Movant,

v.

RENEE ROSS, Debtor; and GAYLE ESKAY
MILLS, Chapter 7 Trustee,

Respondents.

**MOTION FOR RELIEF FROM THE
AUTOMATIC STAY**

**TO: RENEE ROSS (Debtor in Pro Per), GAYLE ESKAY MILLS (Chapter 7 Trustee),
Clerk of the Court and All Interested Parties:**

U.S. BANK NATIONAL ASSOCIATION, as Successor Trustee to Bank of America,
National Association, as successor by merger to LaSalle Bank, N.A., as Trustee for the MLMI
Trust Series 2006-AHL1 ("Secured Creditor"), hereby moves this Honorable Court for an Order
terminating the Automatic Stay so that Secured Creditor and its Trustee may commence and
continue all acts necessary to foreclose under the Deed of Trust secured by Debtor's property.

1 In the event Secured Creditor obtains title to the property at its foreclosure sale, Secured
2 Creditor will incur substantial fees and costs in reselling the Property. Based on past experience
3 of the Secured Creditor, the additional cost is a minimum of eight to ten percent. This cost is
4 primarily commission fees on resale, and title and closing costs. Further, it is typical to incur
5 further expense for putting the property in marketable condition.

6 **FACTS**

7 1. On March 22, 2006, the Debtor entered into a Promissory Note and Deed of
8 Trust with Secured Creditor for the principal sum of \$320,000.00, secured by the real property
9 generally described as 2916 N. 63rd Street, Mesa, Arizona 85215, ("Property"), and legally
10 described as follows:

11 LOT 42, MESA DESERT HEIGHTS, ACCORDING TO BOOK 275 OF MAPS,
12 PAGE 10, AND CERTIFICATE OF CORRECTION RECORDED IN
13 RECORDING NO. 84-527435, RECORDS OF MARICOPA COUNTY,
14 ARIZONA

15 EXCEPT ALL GAS, OIL, METALS AND MINERALS RIGHTS AS
16 RESERVED IN PATENT FROM THE STATE OF ARIZONA

17 2. The Deed of Trust evidencing the transaction was duly recorded with the County
18 Recorder's Office on March 27, 2006, as Document No. 2006- 0407261.

19 3. Secured Creditor alleges the value of the Property to be approximately
20 \$368,500.00, based upon a Broker Price Opinion obtained from Integrated Asset Services, LLC
21 dated January 12, 2009, a copy of which is attached hereto as Exhibit "A" and incorporated
22 herein by reference.

23 4. The Debtor has not made any post-petition payments pursuant to the terms of the
24 Promissory Note and is in default. With respect to Secured Creditor's Trust Deed as of
25 September 14, 2009, the following is due and owing:

26 Unpaid Principal Balance \$312,881.71

27 Total Arrearages

10 Monthly payments at \$2,345.82 each
(December 2008 through September 2009) \$23,458.20

1 The Secured Creditor seeks to lift the automatic stay in this matter so that it may proceed
2 to commence and continue all acts necessary to foreclose under the Deed of Trust secured by
3 Debtor's property. The Bankruptcy Code provides for relief from the automatic stay: "For
4 cause, including the lack of adequate protection of an interest in property of such party in
5 interest." 11 U.S.C.A. § 362(d)(1).

6 Procedurally, a lift-stay movant has the burden to establish prima facie facts entitling it
7 to relief. See In re Elmore, 94 B.R. 670 (Bankr. C.D.Cal. 1988). To establish a prima facie
8 case, the moving creditor must demonstrate the following: that the debtor owes the obligation
9 to the creditor; that there is a valid security interest from which relief from the stay may be
10 brought; or "cause" justifying relief from stay. In re Kin, 71 B.R. 101, 1015 (Bankr. C.D.Cal.
11 1987). After a creditor has established its prima facie case, the burden of proof shifts to the
12 debtor to prove that there is no cause to terminate the automatic stay. 11 U.S.C.A. § 362(g)(2);
13 In re Ellis, 60 B.R. 432, 435 (9th Cir. B.A.P. 1982) citing In re Gauvin, 24 B.R. 578 (9th cir.
14 B.A.P. 1982).

15 This Secured Creditor is the servicer and/or beneficiary of a Promissory Note dated
16 March 22, 2006, in the principal amount of \$320,000.00, which is secured by the above-
17 referenced Deed of Trust. Copies of said Note and Deed of Trust are attached hereto as
18 Exhibits "B" and "C," respectively, and incorporated herein by reference.

19 On or about September 10, 2009, Debtor commenced the current Chapter 7 Bankruptcy
20 proceeding in this Court.

21 The Debtor's total arrearages are broken down as follows:

22 <u>Unpaid Principal Balance</u>	\$312,881.71
23 <u>Total Arrearages</u>	
24 10 Monthly payments at \$2,345.82 each 25 (December 2008 through September 2009)	\$23,458.20
26 Escrow Overdraft	\$1,515.60
27 Bankruptcy Attorneys' Fees and costs	\$400.00
Filing Fee	\$150.00

1 TOTAL DELINQUENCIES \$25,523.80

2 TOTAL Unpaid Principal plus Delinquencies \$338,405.51

3 Secured Creditor has elected to initiate foreclosure proceedings on the subject property
4 with respect to the subject Deed of Trust. However, Secured Creditor is precluded from
5 proceeding to publish the necessary notices and commencing said foreclosure action during the
6 pendency of this Bankruptcy.

7 **I. SECURED CREDITOR IS ENTITLED TO RELIEF FROM THE AUTOMATIC**
8 **STAY UNDER 11 U.S.C. § 362(d)(2)**

9 11 U.S.C. § 362(d) provides:

10 (d) On request of a party in interest and after notice and a hearing, the court shall
11 grant relief from the stay provided under subsection (a) of this section, such as by
terminating, annulling, modifying, or conditioning such stay –

12 (2) with respect to a stay of an act against property under
subsection (a) of this section, if—

13 (A) the debtor does not have an equity in such
14 property; and

15 (B) such property is not necessary to an effective
reorganization. . .

16 Subsection (2) of 11 U.S.C. § 362(d) allows the court to grant relief from the automatic
17 stay if the debtor does not have equity in the subject property and if the subject property is not
18 necessary to an effective reorganization. In In re San Clemente Estates, 5 B.R. 605 (S.D. Cal.
19 1980), the court stated that:

20 Section 362(d)(2) reflects Congressional intent to allow creditors to immediately
21 proceed against the property where the debtor has no equity and it is unnecessary
22 to the reorganization, even where the debtor can provide adequate protection
under Section 362(d)(1). (Emphasis added.)

23 Id. 5 B.R. at 610.

24 In re Mikole Developers, Inc., 14 B.R. 524 (1981), involved a claim for relief under 11
25 U.S.C. § 362(d)(2). The court stated that in determining whether equity exists in the subject
26 property, all encumbrances are totaled, whether or not all the lienholders have joined in the
27 request for relief from stay. Id. At 525. The Ninth Circuit has concurred in this view in Stewart

1 v. Gurley, 745 F.2d 1194 (9th Cir. 1984); see also In re Mellor, 734 F.2d 1396 (9th Cir. 1984).

2 An appropriate cost of sale factor should also be added to determine if the debtor has any equity
3 in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
4 (Bankr. S.D. CA 1982).

5 In the present case, the Debtor has little or no equity in the Property, as evidenced by the
6 approximate market value compared to the total liens against the Property, principally that of
7 Secured Creditor herein.

8 **II. THE DEBTOR HAS THE BURDEN OF SHOWING THAT THE PROPERTY IS**
9 **NECESSARY TO AN EFFECTIVE REORGANIZATION AND, ABSENT SUCH**
10 **A SHOWING, RELIEF FROM STAY SHOULD BE GRANTED**

11 A creditor is entitled to relief from the automatic stay under Section 362(d)(2) unless the
12 debtor has met the burden of establishing that the property is "necessary to an effective
13 reorganization." Section 362(g)(1) and (2) of the Bankruptcy Code, see In re Roselli, 10 B.R.
14 665 (Bankr. PA 1981).

15 "Effective" reorganization means that there must exist a reasonable possibility of such a
16 successful reorganization or rehabilitation. In re Vieland, 41 B.R. 134, 142 (Bankr. Ohio 1984).
17 Since this is a Chapter 7 case, there clearly can be no effective reorganization. Therefore, relief
18 from stay should be granted.

19 WHEREFORE, Secured Creditor prays judgment as follows:

20 (1) For an Order granting relief from Automatic Stay, permitting Secured Creditor to
21 move ahead with foreclosure proceedings under Secured Creditor's Deed of Trust, and to sell
22 the subject Property at a Trustee's Sale under the terms of said Trust Deed, including necessary
23 action to obtain possession of the Property;

24 (2) For an Order waiving the 10-day stay provided by Bankruptcy rule 4001(a)(3);

25 (3) For an Order binding and effective despite any conversion of this bankruptcy
26 case; and,
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(4) For such other and further relief as this Court deems just and proper.

DATED this 30th day of September, 2009.

McCARVILLE LAW OFFICES, PLC

By: /s/ David A. McCarville
David A. McCarville
Attorneys for Movant CITIBANK, N.A., as
Trustee for the MLMI Trust Series 2006-
HE5, assignee for Mortgage Electronic
Registration Systems, Inc.,

COPIES of the foregoing mailed
this 30th day of September, 2009, to:

Renee Ross
19878 W. Sweet Acacia
Casa Grande, AZ 85122
Debtor In Pro Per

Gayle Eskay Mills
P. O. Box 36317
Tucson, AZ 85740
Chapter 7 Trustee

By: /s/ Stephanie G. Enniss